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No. 79-2033

In the
Supreme Court of the United States
OCTOBER TERM, 1979

CAROL C. WOODWARD, as Administrator of the Estate of CHARLES C. WOODWARD, Deceased, and CAROL C. WOODWARD, Individually,

Appellant,

vs.

BURNHAM CITY HOSPITAL, a Corporation, and GEORGE GREEN, and STAN J. BOBOWSKI,

Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS

George Green, Appellee, moves to dismiss the appeal in the above entitled cause for the reason that no substantial federal question is involved and that the federal question sought to be reviewed was not timely or properly raised, and that the judgment rests on an adequate non-federal basis.

A.

The failure to present a federal question in conformance with State procedure constitutes adequate and independent grounds of decision barring a review in the United States Supreme Court. *Michigun* v. *Tyler*, 98 S. Ct. 1942, 436 U.S. 499, 56 L.Ed.2d 486.

B.

All presumption favors the constitutionality of legislation and where a statute is alleged to be unconstitutional, the objection must be specific and complete in order to present fully the matter to the trial court.

McDonald v. *Board of Elections*, 89 S.Ct. 1404, 394 U.S. 802.
Jewel Tea Co. v. *Rowe*, 414 Ill. 496 at 503.
Sheedy v. *Department of Registration*, 33 Ill. 2d 573 at 574.
Thillens v. *Hodges*, 2 Ill. 2d 45.

C.

This case was decided at the state level on the state question of whether or not the statute in question was considered to be "special legislation" and thus in violation of Article IV, Section 13 of the Illinois Constitution of 1970 which states:

> "The general assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

The Illinois Supreme Court ruled that the statute was not special legislation, and that it was a reasonable action under the state's police power. Although the court also

looked to the federal questions claimed, the Illinois Supreme Court decision was accomplished and is sustained on this non-federal question of special legislation.

The United States Supreme Court will not entertain jurisdiction to review a state court's judgment where, besides the federal question decided by the state court, there is another and distinct ground on which the judgment can be sustained.

> *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L.Ed2d 965 (1977).
>
> *Bilby* v. *Stewart,* 246 U.S. 255, 38 S.Ct. 264, 62 L.Ed. 701 (1918).
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> *Rogers* v. *Hennepin County*, 240 U.S. 184, 36 S. Ct. 265, 60 L.Ed. 594 (1916).
>
> *Cornell S. B. Co.* v. *Phoenix Construction Co.*, 233 U.S. 593, 34 S.Ct. 701, 58 L.Ed. 1107 (1914).

An appeal from a state court to the Supreme Court of the United States will be dismissed where the decision of the federal court was based upon a non-federal ground adequate to support it.

> *Holley* v. *Lawrence*, 318 U.S. 518, 63 S.Ct. 394, 87 L.Ed. 434 (1943).
>
> *Bell Telephone Co. of Pa.* v. *Van Dyke*, 296 U.S. 533, 56 S.Ct. 93, 80 L.Ed. 379 (1935).

The Supreme Court will not review the state court's decision of a federal question where it appears that decision does not rest on a federal ground.

> *Flourney* v. *Wiener*, 321 U.S. 253, 64 S.Ct. 548, 88 L.Ed. 708 (1944).

It is enough, to give this court jurisdiction over the judgment of a state court, for the record to show that a federal question was argued or presented to the state court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment could not have been given without it.

Adams v. *Russell*, 229 U.S. 353, 33 S.Ct. 846, 57 L.Ed. 1224 (1913).

California Power Works v. *Davis*, 151 U.S. 389, 14 S.Ct. 350, 38 L.Ed. 206 (1894).

Walter A. Wood Mowing and Reaping Mach. Co. v. *Skinner*, 139 U.S. 293, 11 S.Ct. 528, 35 L. Ed. 193 (1891).

Another point is that where the record presents a federal question, but that question was not the principal matter litigated, but was put into the record for the purpose of an appeal, there is color for motion to dismiss.

East Tennessee V. And G.R. Co. v. *Frazier*, 139 U.S. 288, 11 S.Ct. 517, 35 L.Ed. 196 (1891).

Lastly, and importantly, where the case was disposed of in the state court before the federal question was reached, and its decision was placed on other grounds, the Federal Supreme Court has no jurisdiction.

Crossley v. *New Orleans*, 108 U.S. 105, 2 S.Ct. 300, 27 L.Ed. 667 (1883).

MOTION TO AFFIRM

George Green, Appellee, moves to affirm the decision of the Supreme Court of Illinois because it is clearly right and no federal constitutional questions are involved.

I.

The legislative classification in Section 22.1 does not restrict any "fundamental right" that requires the application of "strict judicial scrutiny."

This court recently explained the modern fourteenth amendment standards in *New Orleans* v. *Dukes*, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). *New Orleans* v. *Dukes*, overruled an earlier Supreme Court decision, *Morey* v. *Doud*, 354 U.S. 457 (1957). *Morey* v. *Doud* invalidated a state licensing scheme for firms issuing money orders. The statute specifically exempted the American Express Company from regulation. *Morey* was the last vestige of an interventionist judicial attitude long repudiated by the Supreme Court. As the Court explained in *New Orleans* v. *Dukes*:

> "*Morey* v. *Doud*, as the dissenters in that case correctly pointed out, see 354 U.S. at 474-475 (Frankfurter, J., dissenting), was a needlessly intrusive judicial infringement on the State's legislative powers, and we have concluded that the equal protection analysis employed in that opinion should no longer be followed. *Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous. . . *The decision so far departs from proper equal protection analysis. . . that it should be, and it is, overruled.*"

The Court explained the current equal protection standard as follows:

> "unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume that constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step, *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, e.g. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488-9 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . it is only the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. See, e.g., *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963).

The legislative classification in Section 22.1 does not restrict any "fundamental right" that requires the application of "strict judicial scrutiny." Strict scrutiny will normally be applied only when the legislation is based upon racial or ethnic classifications. See, e.g., *Brown* v. *Board of Educatom*, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873 (1954) (race); *Graham* v. *Richardson*, 403 U.S.

365, 91 S.Ct. 1848, 29 L.2d 534 (1971) (alienage). The constitutionality of other legislation is judged under the "rational basis" test unless it restricts the exercise of some "fundamental right." The only rights which have ever been held fundamental for equal protection purposes are those which concern the most basic human dignities. See, e.g., *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), (marital right to privacy); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) (right to travel); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (invalidating a statute which discriminated against illegitimate children). *Friendship Medical Center, Ltd.* v. *Chicago Board of Health*, 505 F.2d 1141 (women's right to privacy re: abortion), *Graham* v. *Richardson*, 91 S.Ct. 1848 (1971) (resident aliens in the United States are "persons" within XIV and can't be denied federal welfare payments by Arizona Statute). *San Antonio Indep. School District* v. *Rodrieguez*, 93 S.Ct. 1278 (1973) (class action for school children re: financing public education).

Even if the right to sue and collect damages is considered to be fundamental, Section 22.1 does not violate this right. The constitutional right to a remedy for injuries "do(es) not require that any specific form of remedy be provided plaintiff, rather they are the expression of a philosophy that some remedy be provided." *Mier* v. *Staley*, 329 N.E. 2d at 8. See *Sullivan* v. *Midlothian Park District*, 51 Ill. 2d 274, 281 N.E.2d 659 (1972). The cases have consistently upheld limitations upon rights of action against claims that they denied the right to a remedy. See, e.g., *Mier* v. *Staley*, 329 N.E.2d at 8 (immunizing corporate officers from certain tort claims); *Owen* v. *Wilson*, 537 S.W.2d 543 (S.Ct.Ark. 1976 (two year statute of limitations for medical malpractice actions ran from the time of the negligent act).

"(T)he mere fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not prevent the running of the statute or postpone the period of limitation until he discovers the facts or learns of his rights thereunder. . . ." 51 Am.Jur.2d, *Limitations of Actions,* Section 146.

II.

The plaintiff's action was barred by the Statute of Limitations and there was no violation of Due Process of Law.

Section 22.1 modified the common law rule that was announced in *Lipsey* v. *Michael Reese Hospital,* 45 Ill. 2d 32 (1970). *Lipsey* held that the running of the standard two year statute of limitations for personal injuries did not begin until the plaintiff knew, or through the use of reasonable diligence should have known, of the injury. The *Lipsey* case overruled the previous rule that the statute began to run from the time of the negligent *act,* and established the so-called "discovery rule." Other jurisdictions have split over when the statute of limitations for malpractice cases begin to run. Compare, e.g., *Ruth* v. *Dight,* 453 P.2d 631 (Wash. 1969) (following the discovery rule), with, *Roybal* v. *White,* 383 P.2d 250 (N. M. 1963) (statute runs from the time of the negligent act).

In determining which rule to follow, the courts have had to balance the problems involved with allowing actions based on treatment received years in the past against the possibility of barring some claims which are not discovered until many years after the negligent act. The problems of proof are staggering when, as here, the alleged negligence has occurred more than a decade in the past. Witnesses and records are often unattain-

able, memories are faded, and the possibility of a fair trial is diminished. The discovery rule is particularly unsatisfactory in the field of medical malpractice. Advances in medical knowledge and procedures are occurring every day. What is standard medical practice one year may be grossly negligent a few years later. It is difficult to ignore our present knowledge when judging the actions of those in the distant past.

When enacting Section 22.1 the Illinois Legislature was faced with the above considerations, as well as with the growing concern over the increase in malpractice litigation. The provisions of Section 22.1 reflect a compromise between the two common law rules. Under the statute, the malpractice victim has two years in which to file suit from the time he or she knows, or through the use of reasonable diligence should have known, of the injury. This is the usual statutory period applicable to all personal injury actions. Furthermore, in response to the problems peculiar to medical malpractice actions, the legislature provided that in no event shall such actions be brought more than four years from the alleged negligent act. Section 22.1 is a legislative attempt to protect "the vital interest, if not the necessity, of society in having adequate health care available at reasonable cost." *Wright* v. *Central DuPage Hospital Association,* 63 Ill. 2d 313 (1976) (Underwood J., concurring in part and dissenting in part).

Plaintiff errs when she argues that the State of Illinois has some sort of burden to establish the validity of this legislation (P.12 of Jurisdictional Statement). In fact, all presumptions are in favor of the constitutionality of legislation and the burden of showing unconstitutionality rests with the person who asserts it. *McDonald* v. *Board of Education,* 89 S.Ct. 1404, 394 U.S. 802.

In our case, the plaintiff introduced *no evidence* concerning the presence of; the absence of; or the magnitude of any medical malpractice crisis. This comes about only through plaintiff's argument. In addition, the plaintiff at no stage of the proceeding, raised, specifically, any federal constitutional questions.

The legislature is responsible, primarily for determining proper legislative areas and goals.

Illinois is one of many states that have enacted special statutes of limitation for medical malpractice cases. The constitutionality of these statutes has consistently been upheld in jurisdictions which have considered the issue. In *Landgraff* v. *Wagner*, 26 Ariz. App. 49, 546 P.2d 26, rev. den. (1976), the Court of Appeals of Arizona considered the constitutionality of a statute of limitations very similar to Section 22.1. It provided that all malpractice actions be brought "within six years from the date of injury or two years after the injured party discovers or through the use of reasonable diligence should have discovered the malpractice, whichever period first occurs." A.R.S. Section 12-542 (B). The plaintiff in *Landgraff* claimed that the statute denied her protection, due process, and the right to a remedy. The court upheld the validity of the statute, saying:

> We find that the importance to the public of good health care and the problems which arise when malpractice claims are brought against health providers after the passage of many years constitute sufficient reasons for the legislature to place them in a separate classification for this purpose. In finding a rational basis to the classification, we are supported by decisions from other states.

While no attempt will be made to discuss them individually, the cases from other jurisdictions have all followed the same general reasoning as *Landgraff*. See *Owen* v. *Wilson*, 537 S.W.2d at 543 (two year statute of limitations for malpractice actions which ran from time of negligent act not violative of due process or right to remedy); *Sellers* v. *Edwards*, 289 Ala.2, 265 So.2d 438 (1972) (two year statute of limitations for malpractice actions which ran from time of negligent act did not violate Fourteenth Amendment); *Laughlin* v. *Forgrave*, 432 S.W.2d 308 (Sup. Ct.Mo. 1968) (two year statute of limitations for malpractice actions which ran from time of negligent act did not deny due process or equal protection); *McCarty* v. *Goldstein*, 376 P.2d at 691 (two year statute of limitations for malpractice actions not "special legislation" and did not deny equal protection.)

Statutes of limitations are clearly constitutional, and the guarantee of due process of law does not mean that actions can be filed notwithstanding the prescribed period of limitations.

III.

Section 22.1 of the Illinois Limitation Act is a proper exercise of legislative judgment for the purpose of accomplishing a rational and proper legislative goal. There is no violation of the due process clause.

Plaintiff's argument that hypothetical plaintiffs might be deprived of their actions for damages "without ever having known that they had it" (P. 13 of Jurisdictional Statement) presupposes that the doctors would know it. This is patently not so!

The due process clause requires that the "property rights" of all persons be protected -- this includes the doctors as well as the complaining patients.

This is what the legislature dealt with, and it did so in a fair and reasonable manner. Section 22.1 is a legislative compromise between the rules adopted by the Illinois Courts -- one stating the statute of limitations commences to run from the time of the negligent act, and the other holding the statute starts to run when the party "knew or should have know" of the injury.

Surely, this legislative judgment is neither palpably unfair nor erroneous. This is the proper exercise of legislative judgment, and there is no violation of the due process clause.

IV.

Section 22.1 does not deny access to the Courts, but like other statutes of limitations, it places reasonable time limitations on bringing action.

If the legislature had provided a time limitation of *twenty-five years* instead of four years, complaint might still be made; but the fundamental question would be the same. Did the legislature exercise reasonable legislative judgment.

Certainly, *all* persons are entitled to due process! We urge that this legislation does not deprive any person of due process of law.

CONCLUSION

The classification used has a definite basis and is reasonably related to a proper state interest. The decision of the Supreme Court of the State of Illinois should be affirmed.

Respectfully submitted,

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